

# Seventh Circuit Joins Other Courts in Rejecting ADEA Impact Claims by Job Applicants

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On January 23, 2019, a majority of the Seventh Circuit ruled in an en banc decision that the federal [Age Discrimination in Employment Act](#) (ADEA) does not permit disparate impact challenges to employers' hiring practices. See *Kleber v. CareFusion Corp.*, 2019 WL 290241 (7th Cir. Jan. 23, 2019). In reaching this conclusion, the Seventh Circuit joined the Eleventh Circuit, which reached the same result in *Villareal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 964 (11th Cir. 2016) (*en banc*). There are many hiring practices and criteria that do not constitute intentional discrimination against older individuals, but might have the effect of screening out older applicants, such as maximum years of experience, maximum prior salary earned, recency of college graduation, being a "digital native," and certain physical fitness requirements. While these practices may adversely affect older applicants, employers can avoid ADEA liability by proving that the standard is justified by a "reasonable factor other than age." Before being put to the proof of a defense, however, employers in recent cases have challenged whether such a theory is even viable when used by job applicants. So far, employers are winning this battle over the meaning of statutory language.

In this case the plaintiff, Dale Kleber, had applied for a senior in-house counsel position in CareFusion's law department but was rejected because the job description required applicants to have between 3 and 7 years of legal experience. Mr. Kleber was 58 and had more than 7 years of relevant experience; CareFusion hired a 29-year old applicant who did not have in excess of 7 years of experience. Mr. Kleber sued for age discrimination, using the disparate impact theory arguing that CareFusion violated the ADEA by using a neutral criterion that disproportionately excludes individuals over age 40.

## **Title VII and the Age Discrimination in Employment Act**

Understanding why the Seventh Circuit rejected Mr. Kleber's claim as legally insufficient requires a little background on Title VII and the ADEA and how the disparate impact theory has developed.

Under Title VII, it has long been established that the disparate impact theory can be used by employees and applicants for employment to challenge neutral practices that have an adverse impact on a protected class of individuals. The first Title VII case decided by the Supreme Court was *Griggs v. Duke Power*, 401 U.S.424 (1971), in which the Court held that Duke Power's requirement of a high school diploma for its higher paid jobs violated Title VII because the diploma requirement screened out a disproportionate number of African Americans, and the company could not demonstrate that the requirement was related to the jobs performed. (Under Title VII, employers have to prove that their practices are "job related and consistent with business necessity.") The *Griggs* case arose as a class action in which the certified class included employees seeking internal transfers to better paying jobs as well as external applicants. The Court did not distinguish between the two in holding that the plaintiff class could challenge the job requirement under a disparate impact theory. The next year, in

1972, Congress amended Title VII to add the word “applicants” to the provision outlawing practices that have a disparate impact, stating that it was conforming the statute to existing law, and expressing approval of the *Griggs* decision. Congress did not make a parallel amendment to the ADEA, which had identical language to the Title VII provision the *Griggs* Court had analyzed.

In 2005, the Supreme Court settled a question that had divided the lower courts when it held that age discrimination plaintiffs can prove their claims using a disparate impact theory. See *Smith v. City of Jackson*, 504 U.S. 228 (2005). But *Smith* involved a claim that the Jackson police department’s salary plan discriminated against older workers by pinning raises to officers’ number of years of tenure with the department. The Court had no occasion to rule on whether disparate impact claims, challenging unintentional discrimination, could be brought by applicants for employment, as opposed to existing employees.

On another unrelated question of statutory interpretation involving the ADEA, the Court held in 2009 that ADEA plaintiffs, unlike Title VII plaintiffs, must always establish their claims under a burden of proving that age was the “but-for” cause of the discrimination, not just a “motivating” factor as allowed in Title VII cases. See *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167 (2009). The Court reached that conclusion because in 1991 Congress had added a “motivating factor” provision to Title VII but not to the ADEA. This divergence of the two statutes through amendments to one and not the other had a controlling impact on the Seventh Circuit’s approach to the issue in this case.

This difference in the statutory text of Title VII and the ADEA—that Title VII mentions applicants in the disparate impact section and the ADEA does not—forms the basis of the Seventh Circuit’s rejection of Mr. Kleber’s challenge to CareFusion’s experience requirement that tends to screen out older job applicants. The fact that the *Griggs* Court read the Title VII language to proscribe practices with a disparate impact on job applicants forms the basis of the dissenting judges’ rejection of the majority’s approach because, as they emphasize, the ADEA language is identical to that in Title VII before the amendment.

## **Age Discrimination Will Remain Difficult to Prove**

In the *Kleber* and *Villareal* cases, the plaintiffs lost because a majority of the judges in the Seventh and Eleventh Circuits determined that the 1972 decision to amend Title VII specifically to include applicants in the disparate impact provision sounded the death knell for disparate impact claims under the ADEA brought by applicants to challenge practices that disproportionately exclude older candidates for jobs. Although all the judges involved in these decisions acknowledge that a paramount purpose of the ADEA was to eradicate discrimination in hiring against older workers, the majority insisted it is up to Congress to write a statute that clearly extends the ADEA disparate impact theory to job applicants.

Other courts of appeals had not squarely addressed this question since the Supreme Court decision in *Gross* signaling the need to focus on statutory textual differences in construing the relevance of precedent under Title VII to decide ADEA cases. There is thus no clear circuit split on this question, so Supreme Court review seems unlikely. The Court denied a petition for review in *Villareal* and nothing has changed that would make review in *Kleber* more likely. Absent congressional action, [individuals who believe they are not being hired because of their age](#) will be limited to challenging such decisions under a theory of intentional discrimination, which is notoriously difficult to prove.